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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1959.

No. 347

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO, and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend,

Respondents.

LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS,

Respondents.

and

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

E. R. BORGMEIER,
30 North LaSalle Street,
Chicago 2, Illinois,
Petitioner, attorney pro se.

WILLIAM C. JEROME,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago

IN THE

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JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, E. R. Borgmeier, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit herein sought to be reviewed was rendered May 27, 1958, bears its Case No. 12504, is reported at 267 Fed. 2nd 254, and is set forth in the Appendix hereto. That opinion affirmed the judgment order entered by the District Court of the United States for the Western District of Wisconsin on September 19, 1958.

The opinion and judgment order rendered September 19, 1958, by the District Court of the United States for the Western District of Wisconsin, and sought to be reviewed in Case No. 12504 of the United States Court of Appeals for the Seventh Circuit, is not reported, but appears in the Appendix hereto.

JURISDICTION

The Court of Appeals rendered its opinion on May 27, 1959. No petition for rehearing was filed. This petition is filed within 90 days from said date. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1); and under Rule 19 (b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED.

I. Was the case at issue in the District Court on September 19, 1958, under the pleadings filed therein, as required by the opinion of the Court of Appeals in Case No. 11873 (241 Fed. 2nd 865)?

II. Was the document filed December 21, 1955, (a bill for services rendered by attorney to client) a pleading under the Rules of Civil Procedure or under the Rules of the District Court for the Western District of Wisconsin?

III. Can the trial court enter judgment against petitioner on matters of account between the parties which matters are not issues in this law suit?

IV. Can the District Court find that Edmund Johnson has no lien, when the record clearly shows that Edmund Johnson, who acquired title to the lien in March, 1955, is not a party to this law suit?

V. Does the order of September 19, 1958, and its affirmance by the Court of Appeals bring this cause within the supervisory provision of Rule 19 (b) of the Rules of the Supreme Court, as "constituting a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision"?

STATEMENT OF THE CASE.

The Court of Appeals, in its opinion rendered in Case No. 11873, (241 Fed. 2nd 875) found that the District Court had no jurisdiction over Borgmeier, and vacated the appealed-from order of November 17, 1955. It went on to say "it appears that, subsequent to the entry of the order of which complaint is made, on December 21, 1955, plaintiff filed with the clerk of the district court her claim for lien upon the fund. Of course, the jurisdiction of the court based thereon must date from the day of the filing and not from something that happened before she became a party." The court thus referred to a carbon copy of a bill for legal services rendered by attorney to client (from petitioner to plaintiffs herein) on February 21, 1955 (Rec. 100-121; 11873 App. 19a-20a; 12504, App. 11a-12a).

The Court further said in passing that the District Court had no jurisdiction on November 17, 1955, but would acquire jurisdiction "to determine the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined", and says that the document of December 21, 1955, the carbon copy of the bill for services, which stood alone and was not part of any complaint, answer, petition or motion, constituted an appearance. The Court of Appeals in case 11873 did not indicate that issue was joined on that document filed December 21, 1955 (the bill for services), nor was it joined on another document, a carbon copy of a notice of attorney's lien served on defendants on February 25, 1955, and placed with the District Court Clerk on December 13, 1955 (Rec. 95-99; 11873, App. 15a-19a; 12504, App. 9a-11a) [which opinion No. 12504 wrongly declared was the document filed December

21, 1955; as well as distorting and misrepresenting other pertinent facts].

Both of these documents were private correspondence between the parties, dehors the proceedings.

The District Court on September 19, 1958, interpreted the opinion of the Court of Appeals in Case No. 11873, and erroneously treating these documents as legal pleadings, entered judgment against petitioner on September 19, 1958, stating that (Opinion, Rec. 467, App. 26a) the nature and extent of petitioner's claim for lien is set forth in her notice of lien [served on defendants dehors the proceedings, and filed with the District Court Clerk on December 13, 1955, (Rec. 95-99; 11873, App. 15a-19a; 12504, App. 9a-11a)] and in her "Special and Limited Appearance" dated December 30, 1954 (Rec. 24-29; 11873, App. 5a; 12504, App. 7a).

This judgment is based on an assumption of jurisdiction which does not exist; and the trial court judgment of September 19, 1958, is in error in numerous particulars, including the following:

1) that Wisconsin District Court had jurisdiction of Borgmeier and subject matter of her claimed lien (terming her "Intervenor");

2) that it was not necessary that Johnson, Borgmeier's assignee, be made a party;

5) Borgmeier never had lien;

6) actions of defendants in paying Clerk of Court amounts due under settlement agreement afforded Borgmeier an adequate opportunity of protecting her rights regarding said funds and relieved them from any further duty with respect to said lien and said deposited funds;

7) that part of the order of November 17, 1955, directing payment by Clerk of $20,000.00 is approved, and payment thereof is free and clear of any lien of Borgmeier or Johnson;

8) Balance of $12,500.00 may be released to plaintiffs free from any lien of Borgmeier or Johnson;

9) balance of cost bond originally posted by plaintiffs be returned to them;

10) Borgmeier owes plaintiffs $2936.20.

The Court of Appeals in Case No. 12504 (267 Fed. 2nd 254) did not rule or make any finding with reference to the judgment of September 19, 1958, which judgment was the one appealed from, and which was the sole matter before the Court of Appeals. Its only reference to said order of September 19, 1958, is the single word "Affirmed".

ARGUMENT.

The District Court for the Western District of Wisconsin on September 19, 1958, interpreted the opinion of the Court of Appeals in Case No. 11873, and in effect reversed it, and concluded that a carbon copy of a bill for legal services rendered by attorney to client, which was the document filed December 21, 1955 (or alternatively, a carbon copy of a notice of attorney's lien served on defendants, filed December 13, 1955), both private correspondence between the parties and placed in the hands of the District Court Clerk, each of which stood alone, constituted legal pleadings under the Rules of Civil Procedure.

Are either of these documents, neither of which is a part of a complaint, answer, petition, motion or any other pleading, a pleading upon which issue can be joined under the Rules of Civil Procedure? Can the trial court assume jurisdiction of issues from its knowledge that documents of this nature, which are private correspondence between the parties, are in existence? Can issues be considered to be joined, and the pleadings complete on these two documents, which are no part of the District Court record?

The District Court treated these as pleadings of some sort, which joined issues in the case, and proceeded with the case as having issues joined on these two documents. It then proceeded to exercise jurisdiction over Edmund J. Johnson (who had acquired petitioner's claim by assignment in March, 1955), and who was not a party to this litigation at any stage thereof; further makes a finding that petitioner herein has no claim for lien, which is not an issue before him, and on which issue was never joined; proceeds to find and enter judgment against this

petitioner on an accounting on matters between the parties occurring in the State of Illinois, and which were not at any stage part of the litigation in the Western District of Wisconsin, but on the contrary; were and are the issues pending in the District Court for the Northern District of Illinois; he also affirms and approves the order of November 17, 1955, vacated by the opinion of the Court of Appeals in Case No. 11873.

In effect, the District Court for the Western District of Wisconsin has exercised appellate powers over contemporary and superior courts. This the District Court has no authority to do, and therefore the judgment order of September 19, 1958, finding judgment against petitioner and rendering an accounting, and finding that assignee Edmund J. Johnson is a party, is wholly void and of no effect.

The Court of Appeals in Case No. 12504 completely overlooked the fact that issue had not been joined in the lower court, and erred in affirming the decision rendered September 19, 1958, in the District Court.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. R. BORGMEIER,

Petitioner, attorney pro se.

WILLIAM C. JEROME,
Of Counsel.

APPENDIX.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12504 SEPTEMBER TERM, 1958 - APRIL SESSION, 1959

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO, and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend,
Plaintiffs-Appellees,

v.

LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS,
Defendants-Appellees,

and

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,
Impleaded Defendants-Appellees.

On appeal of E. R. BORGMEIER,
Respondent-Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.

May 27, 1959

Before DUFFY, *Chief Judge*, and MAJOR and KNOCH, *Circuit Judges.*

(Appendix)

DUFFY, *Chief Judge.* During October, 1952, appellant Borgmeier, who is an attorney at law, was employed by plaintiffs under an oral agreement to prosecute an action against defendants concerning certain real estate in Sauk County, Wisconsin. The terms of the agreement were that appellant was to receive a contingent fee of 50% of any recovery. In May, 1953, she filed suit for plaintiffs against the defendants in the District Court of the United States for the Western District of Wisconsin. A constructive trust in plaintiffs' favor was claimed.

On July 30, 1954, defendants filed a motion for summary judgment demanding a dismissal of the cause upon the merits. Appellant did not file any answer or reply to said motion, nor did she file a brief or affidavits in opposition. In spite of the fact that plaintiff, Helen Fleming, had theretofore advanced considerable funds for expenses, appellant Borgmeier demanded $6,000.00 additional for expenses, threatening to withdraw from the prosecution of the action if such sum were not paid. On November 3, 1955, with the consent of the Court, she withdrew as attorney for plaintiffs[1]. The Court directed Frank M. Coyne, Esquire, who was local counsel of record, to advise the plaintiffs that to avoid a default they should file an answer, brief and affidavits, and ordered such papers and pleadings to be filed by November 24, 1954.

Plaintiffs attempted to prevail upon appellant to reconsider her withdrawal as attorney for plaintiffs, and asked her to prepare the necessary papers and pleading to oppose the motion for summary judgment. Appellant refused these requests. Plaintiffs then engaged Attorney Coyne who drafted and filed an answer, a brief and affidavits. The Court denied the motion for summary judgment.

Attorney Coyne and an associate requested appellant to give them access to the materials and papers she had accumulated so that copies might be made thereof, but appellant refused to do so. The Court vacated its consent to

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[1] Borgmeier claims that in fact she was discharged by plaintiffs.

appellant's withdrawal from the action and directed her to turn over to Attorney Coyne the records and materials requested, but appellant refused to comply with the order of the Court.

Trial was commenced on September 20, 1955, and the following day plaintiffs' claim was settled for $32,500.00. By agreement this claim was to be paid into court in three installments, and defendants did pay to the Clerk of the District Court, $10,000.00 on October 11, 1955, $10,000.00 on November 8, 1955, and $12,500.00 on September 4, 1956.

Appellant prepared a notice of attorney's lien dated February 25, 1955, copy of which she mailed to the various defendants. She filed a signed copy thereof with the Clerk of the District Court for the Western District of Wisconsin on December 21, 1955. This notice was captioned "In the District Court of the United States for the Western District of Wisconsin." The caption also contained the names of the plaintiffs, the defendants and the impleaded defendants. Among other things, the notice stated "Please Take Notice that the undersigned attorney, E. R. Borgmeier, of Lemont, Cook County, Illinois, was heretofore employed by * * * (plaintiffs) * * * to prosecute the above action against you, and who (plaintiffs) agreed to pay as compensation for such services rendered one-half (½) of whatever amount might be recovered therefrom by suit, settlement or otherwise, with the agreement that such compensation * * * would be a first lien on any amount recovered: * * * and therefore the undersigned claims a lien upon the above cause of action and upon any proceeds or damages which may be derived in said action * * *."

Shortly after the settlement was made, appellant was advised of same, and received a copy of the stipulation upon which it was based. Appellant took no steps to perfect her lien, and on November 17, 1955, the District Court entered an order for the payment to the plaintiffs of $20,000.00 from the funds on deposit with the Court. Borgmeier appealed from said order and in *Fleming* v. *Lake Delton Development Company*, 7 Cir., 241 F. 2d 865, we held the undelivered registered mail notice addressed to

Borgmeier was insufficient to confer jurisdiction over her or the subject matter. However, we noted from the records on the appeal before us that on December 21, 1955, Borgmeier did file with the Clerk of the District Court her claim for lien upon the fund derived from the settlement. We held this appearance conferred jurisdiction from the date of the filing, to-wit: December 21, 1955, over both the subject matter and the person of appellant Borgmeier. In our mandate we remanded the cause to the District Court with directions to proceed to determine the merits of the Borgmeier claim for lien after the issues pertaining thereto had been properly joined.

Borgmeier filed a petition for rehearing from that part of the decision of this Court that remanded the cause. She strongly argued she had not submitted herself to the jurisdiction of the District Court of the Western District of Wisconsin. As an explanation of why she filed a notice of attorney's lien with the Clerk of the Court she said it was "* * * a necessary concommitant [*sic*] in perfecting the appeal herein (after the case in chief had been disposed of) for the sole purpose of including said document with the record on this appeal. * * *" In spite of such contention, we denied the petition for rehearing. Thereafter Borgmeier petitioned the Supreme Court for certiorari making a contention similar to that urged in her petition for rehearing in this Court. The petition for certiorari was denied. 355 U.S. 821.

On the instant appeal, Borgmeier is here once more making the same arguments and submitting the same issues which were presented when the case was here before. The parties are the same, and whether the situation be designated as *res judicata* or as the law of the case we think appellant Borgmeier has no standing to again litigate this question. When the Supreme Court denied certiorari, our decision became final.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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AND

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES AND A. B. BATTY, *Respondents.*

BRIEF OF RESPONDENTS (NAMED BELOW) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RAY M. STEELE,
1 West Main Street,
Madison 3, Wisconsin,

ARTHUR WICKHAM,
2 North Broadway,
Milwaukee 2, Wisconsin,

Attorneys for Lake Delton Development Company, Ralph M. Hines and Henry C. Titus, Respondents and Cross-and Defendants, and James H. Hill, Jr., Respondent and Interpleaded Defendant.

THE LAWYER'S PRESS, INC., 207 E. 37TH ST., N.Y.C. 16

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AND

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES AND A. B. BATTY,

Respondents.

BRIEF OF RESPONDENTS (NAMED BELOW) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ADDITIONAL STATEMENT.

The decision now involved (267 F. 2d 254) is set forth in petitioner's appendix. Concerning the decision petitioner states (Pet., p. 5) that the court of appeals was "distorting and misrepresenting other pertinent facts." We know of no fact which was distorted or misrepresented. Petitioner calls attention to nothing that in any way could be considered as distorting or misrepresenting. An examination of the decision will indicate that what is there set forth is clear, brief and to the point. There is a temptation to elaborate on what is there stated. Under the circumstances we will refrain from doing so.

With respect to one of the prior decisions of the court of appeals (241 F. 2d 865) it is true, as petitioner states, that it was there held that the district court had no jurisdiction over petitioner at the time of the entry of the order appealed from, that dated November 17, 1955. The court there further held that as the result of the filing on December 13, 1955 by petitioner of the claim for lien, such conferred jurisdiction as of that time. As mentioned by the court (App., p. 4a) such was said by petitioner to be "necessary * * *" in perfecting the appeal." This claim was then supplemented by the filing on December 30, 1955 of a copy of a statement which petitioner had previously rendered to plaintiffs [the first group of respondents mentioned in the caption]. The court of appeals on that occasion set forth in its mandate that the cause be "remanded to the district court with directions to proceed to determine the merits of appellant's claim for lien after the issues pertaining thereto had been properly joined." Petitioner then petitioned this court for a writ of certiorari. Such was denied (355 U. S. 821).

Upon the matter being remanded to the district court plaintiffs pursuant to the mandate filed their answer (Rec. 439). The surviving defendants and interpleaded defendants likewise filed their answer (Rec. 454). When the matter came on for trial petitioner was represented by William C. Jerome. [He is counsel for petitioner with respect to the present petition.] He stated he appeared specially. He objected to the court's determination of the matter upon its merits because of lack of jurisdiction and because no claim for lien had ever been filed by petitioner (Rec. 466). He offered no evidence either with respect to lack of jurisdiction or with respect to the other defenses previously interposed by petitioner, that said claim had been assigned on March 26, 1955, to Edmund L. Johnson (Rec. 461). Findings of fact and conclusions of law [referred to by petitioner as the trial court's "opinion"] were made by the trial court (Rec. 465). The judgment of the trial court was entered the following day, September 19, 1958 (Rec. 483).

No transcript of the proceedings before the trial court were made a part of the record on appeal or are part of the record forwarded to this court.

ARGUMENT.

Petitioner's second question (Pet., p. 3) deals with the bill for services rendered by petitioner to plaintiffs and filed December 30, 1955. It is claimed that such was not a pleading. We agree. It was never, so far as we know, so considered by anyone. When petitioner filed the claim for lien on December 13, 1955, such was undoubtedly deemed to be an ancillary proceeding. Such was held on the first appeal (241 F. 2d 865) to be petitioner's pleading. The copy of the statement for services thereafter filed was undoubtedly, as was the filing of the lien, considered "necessary," as stated by petitioner, "in perfecting the appeal." But the sole reason as to why such should be necessary was because otherwise petitioner would not be a "party" to the action and thus not entitled to appeal.

U. S. v. *Siegel*, 168 F. 2d 143.
Moore's Fed. Prac., Vol. 7, § 73.04, p. 3126.

It is further stated by petitioner that another question presented (Question 1, Pet., p. 3) was as to whether the matter was at issue at the time of the trial as required by the opinion of the court (241 F. 2d 865). The answers interposed by plaintiffs and by the surviving defendants and interpleaded defendants were filed for the purpose of joining issue with respect to petitioner's claim for an attorney's lien. It is not suggested as to how there could be a better or more perfect joinder of issue than was done as the result of the filing of these answers. We know of none.

It is contended in this regard that neither the claim for lien filed by petitioner nor the supplementing of that claim as a result of the statement of the amount said to be due

petitioner for services rendered to plaintiffs are not a pleading upon which issue could be joined. The filing of the claim for lien, together with this supplementation, was in the nature of an ancillary proceeding. These papers, filed by petitioner, together with the subsequent answers, served every purpose and function which any pleading might properly embrace. Petitioner does not claim that there was an inaccurate statement of petitioner's version of the case. Certainly the plaintiffs and defendants were apprised of the nature of the claim for lien. We fail to see how the issues could be sharpened or limited in order to arrive at a proper determination of the controversy. The court was informed so far as the pleadings were concerned as to the facts in issue. There was nothing to indicate that a fair trial upon the merits could not be had. There was a compliance with Rule 8(e)(1) of the Rules of Civil Procedure, which require that every averment should be simple. There was, we believe, clarity, brevity, conciseness and directness and thus there was in this regard also a compliance with the provisions of Rule 8. Nothing is suggested as to how the pleadings could be more complete and we know of nothing which from a practical standpoint could be alleged or denied in order properly to present the controversy to the court.

Petitioner's third question is as to whether the trial court could enter judgment on matters of account which are not issues in the action. In view of the fact that the claim for lien supplemented by the statement of the amount said to be due from plaintiffs were filed by petitioner with the clerk of the trial court, we fail to see why these claims and allegations could properly be disregarded. Certainly defendants, who had made payment to the clerk of the trial court of the amount due pursuant to the settlement agreement, were also entitled to a determination with respect to the amount due, if any. Would there not have

been a serious omission with respect to the proof, had there been no testimony with respect to this vital element of petitioner's claim? Rule 54(c) of the Rules of Civil Procedure expressly provides:

> "* * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

In *Shell Oil Co.* v. *Dye*, 135 F. 2d 365, the question arose as to whether plaintiff's right to maintain an action for damages for breach was an exclusive remedy in the pending injunction suit. The court stated, page 370:

> "The court was sitting in quity and was authorized, if not required, to determine all disputes incidental to the main controversy."

We fail to see furthermore how the pendency of any action in the State of Illinois (proof of which was not offered), which was said to be subsequently instituted by petitioner's claimed assignee, would have any bearing upon the matter or would deprive the trial court of jurisdiction, particularly in view of the mandate of the court of appeals, that the district court should "proceed to determine the merits of appellant's claim for lien."

Petitioner's contention, that the judgment is based on an assumption of jurisdiction which does not exist (Pet., p. 5), might be discussed in this connection. Petitioner voluntarily filed the claim for lien. One who files a claim with the court thereby submits himself to the jurisdiction of that court and it is thereupon empowered to adjudicate the claim.

Alexander v. *Hillman*, 296 U. S. 222, 241.
General Elec. Co. v. *Marvel Co.*, 287 U. S. 430, 435.

Such was the holding on the prior appeal (241 F. 2d 865.

866). It was our position that under such circumstances the appellate court, having considered and passed on the question of jurisdiction and then remanded the action for further proceedings, that question became settled, and, unless the facts were substantially different, such on a subsequent appeal became the law of the case.

Insurance Group Com. v. *D. & R. G. W. R. Co.*, 329 U. S. 607, 612.

International Brotherhood, etc. v. *Western Union Tel. Co.*, 46 F. 2d 736, 737.

3 Am. Jur., Appeal and Error, § 985, p. 541.

The facts, we submit, were the same. It was the position of the court of appeals, however, that "whether the situation be designated as *res judicata* or as the law of the case, we think Appellant Borgmeier has no standing to again litigate this question."

Another point that might be discussed in this connection is petitioner's claim of "error in numerous particulars" Pet., p. 5). Points 5 to 10 inclusive are, we submit, properly and adequately disposed of as the result of the trial and the findings of fact and conclusions of law and the judgment thereafter entered. For instance, the proof is undisputed that petitioner never had a lien, either under the Wisconsin statutes, which had previously been petitioner's position (Rec. 462, 451, 476), or otherwise. Furthermore, defendants were entitled to deposit the money to be paid by way of settlement to the clerk of the trial court and then give reasonable notice to claimant and afford her an opportunity of enforcing her claimed lien. See annotation at 147 A. L. R. 983, and *U. S.* v. *Atlantic Coastline R. R. Co.*, 135 F. Supp. 600.

The court of appeals furthermore disposed of the issues raised by petitioner on this most recent appeal. The only points set forth in the printed argument were as to the claimed lack of jurisdiction over appellant and that any

action to prosecute the claim for lien should have been by Johnson as the real party in interest. This first point was discussed above. The claim that Johnson acquired a lien is commented upon immediately below.

The fourth question said by petitioner to be presented is as to whether the district court could find that Johnson, the claimed assignee of the lien, was not a party to the suit. The findings of the trial court (Finding 20, Rec. 478) was that petitioner claimed to have assigned such claim to Johnson; that he had joined with petitioner on her prior petition to this Court for a writ of certiorari; that he had collaborated and cooperated with petitioner in the prosecution of said lien; and that he was fully cognizant of the matters involved and the proceedings referred to, and particularly with respect to what steps have been and have not been taken with respect to such lien. This phase of the matter is further covered in Conclusion of Law B (Rec. 479), where it was set forth that it was not necessary under the provisions of Rule 25(c) of the Rules of Civil Procedure to join said Johnson as an indispensable or necessary party to the proceeding; that the issues can be conveniently disposed of without his appearance; that he as such assignee would have no other or greater rights than had petitioner; that he also was fully cognizant of the matters involved; and that he because of his collaboration and cooperation was bound by the acts of petitioner and the failure to protect the lien with the same force and effect as though he had actually been made a party herein.

Because of petitioner's contention with respect to such assignment the following questions arose:

(a) Was there in fact any assignment?

(b) If so, was it full and complete and were all rights transferred, or was petitioner still the legal owner, at least in part?

(c) In any event, was the assignment valid?

The burden of proof was on petitioner to establish the facts in these respects. There was a total failure to do so. No evidence whatsoever was offered with respect to any such assignment. The statement by petitioner, that "the record clearly shows that Edmund Johnson * * * acquired title to the lien," is without foundation.

The fifth question said to be presented is as to whether the judgment of September 19, 1958, and its affirmance by the court of appeals brings the matter within the purview of Rule 19(b) of the rules of this court. The question under this rule is, in other words: should this Court grant the petition in the exercise of its sound judicial discretion because of special and important reasons therefor, to-wit, because the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision?"

The claimed improprieties of both the court of appeals and the district court have been, we believe, sufficiently commented upon above. It is respectfully urged that there has been no departure by either court "from the accepted and usual course of judicial proceedings," and further that there is no special or important reason for such review.

CONCLUSION.

Petitioner was accorded every possible opportunity to enforce the claimed lien in the trial court. Prior to the filing of the notice of lien on December 13, 1935, petitioner, as indicated by the decision of the court of appeals (241 F. 2d 865), was not entitled to appeal. The trial court prior to that time could not properly be criticized by petitioner for his action in attempting to prevail on petitioner to proceed to make claim with respect to the funds already de-

posited and to be deposited with the clerk. Petitioner, however, persisted in appealing and thus obtained the writs of mandamus and prohibition. The court of appeals also afforded petitioner every right. In its first decision (233 F. 2d 818) it held that a writ of mandamus and a writ of prohibition should be granted, thus affording petitioner the right to present the matter on appeal. By its second decision (241 F. 2d 865) this court also afforded to petitioner the opportunity to determine the merits of the claim for lien. Petitioner, however, refused to offer any testimony with respect to such claim for lien and refused also to do anything else to protect the claimed rights in that regard. Petitioner failed further to comply with the Rules of Civil Procedure in not objecting, either by motion or by answer, to the sufficiency of service as contemplated by Rule 12(b). Petitioner also failed to comply with the state rules (Sec. 262.17, Wis. Stats.), whereby an objection to the court's jurisdiction over the person of a defendant shall be raised, depending upon the circumstances, by either motion, demurrer or answer.

Should there not be an end to this protracted litigation? We respectfully urge that there should be and that the petition should be denied.

Respectfully submitted,

RAY M. STROUD and
ARTHUR WICKHAM,
Attorneys for Lake Delton Development Company, Ralph M. Hines and Henry C. Titus, Respondents and surviving defendants, and James H. Hill, Jr., Respondent and Interpleaded Defendant.